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Supreme Court of the United States

October Term, 1996

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Petitioners,

v.

COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, KELSON "MAC" POEPOE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents **COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, and KELSON "MAC" POEPOE** (collectively referred to as "Respondents") respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari (hereinafter "Petition"), which seeks review of the Hawaii Supreme Court's opinion below. That opinion is reported as *Bush v. Watson*, 81 Haw. 474, 918 P.2d 1130 (1996) ("*Bush II*") and is reprinted in the Petition at Appendix A.

STATEMENT OF THE CASE

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (July 9, 1921), as amended (hereinafter "HHCA"), *reprinted in* 1 Hawaii Revised Statutes (1993) ("H.R.S.") 167 *et seq.*, established a homestead program for native Hawaiians.[1] The HHCA was adopted as a federal-state compact and as a provision of the Constitution of the State of Hawaii pursuant to § 4 of the Hawaii Admission Act.[2] In these enactments "the federal

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[1] "Native Hawaiians" are defined in the HHCA as including "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." § 201(7), H.H.C.A.

[2] Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959) (providing that as a compact with the United States the HHCA shall be adopted as a provision of the Constitution of the State of Hawaii); *see also* Haw. Const., Art. XII, §§ 1-3 (adopting HHCA as "a law of the State," § 1, as "a compact with the United States," §§ 2, 3, and "as a provision of the constitution of this State," § 3).

government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a trust obligation benefiting the aboriginal people . . . [and] . . . the State of Hawaii assumed this fiduciary obligation upon being admitted to the Union as a state." *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982). The management and operation of the Home lands program is placed with the Hawaiian Homes Commission ("the Commission"), a nine member body appointed by the governor. § 202, H.H.C.A.; § 26-17, H.R.S.

In fulfilling the statutory goals of the Hawaiian Home Lands program, the Commission issues leases for a term of 99 years at $1.00 per year to qualified native Hawaiians for farming, ranching and residential purposes. All lessees are subject to certain statutory conditions expressly set forth in § 208 of the HHCA which regulate the use of their homestead, "whether or not stipulated in the lease." § 208, H.H.C.A.

One condition states that the lessee "shall not in any manner transfer to, or otherwise hold for the benefit of any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department. . . . " § 208(5), H.H.C.A. In implementing § 208(5), the Commission and the Department of Hawaiian Home Land's ("the Department") administrative rules declare that a lessee may not "enter into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by [a] lessee's lease" without the written approval of the Commission. H.A.R. § 10-3-35.

Since 1980, Petitioners, who are all lessees of the Hawaiian homestead program, have entered into Third Party Agreements[3] (hereinafter "TPAs") with Respondents Larry Jefts, et al., non-Hawaiian farmers, for the occupation, use, and cultivation of their agricultural homestead lots on Moloka'i, without the approval of the Commission. *Bush v. Hawaiian Homes Commission*, 76 Haw. 128, 132, 870 P.2d 1272, 1281 (1994) ("*Bush I*"). Petitioners are paid an average of $150.00 per month for the use of their lots, and, at least one non-Hawaiian farmer, Larry Jefts, has amassed close to 495 acres of homestead land, under thirteen different leaseholds. *Id.* The operations of these large plantations have been injurious to Respondents Bush, Kahae and Poepoe, who seek to become economically self-sufficient by farming their own agricultural lots, by infecting them with melon fly infestation, pesticide drift, and by subjecting them to unfair subsidized competition benefiting from substantial economies of scale.

In December of 1991, the Department notified Petitioners that their existing TPAs did not comply with HAR § 10-3-35, and were therefore unlawful. *Bush I*, 76 Haw. at 132, 870 P.2d at 1281. In May of 1992, the Commission approved Petitioners' TPAs over Respondents' objections. *Id.*, 76 Haw. at 133, 870 P.2d at 1281. Respondents had requested a "contested case" administrative hearing in which they could appear and formally contest the

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[3] A Third Party Agreement ("TPA") is an agreement whereby the lessee of an agricultural homestead allows a stranger to the lease to use his or her land for farming or pastoral purposes.

approval of such TPAs, but this request was denied by the Commission. *Id.* This denial was affirmed on appeal. *Id.*, 76 Haw. at 136, 870 P.2d at 1281. The *Bush I* court, however, was careful to point out that Respondents were "not barred from contesting the Commission's actions through alternative means . . . ". *Id.*, 76 Haw. at 137, 870 P.2d at 1281.

Immediately upon the issuance of the *Bush I* opinion in 1994, Respondents filed a new suit, the present action, seeking declaratory and injunctive relief and claiming that the existing TPAs violated sections 208(4) and (5) of the HHCA. The trial court granted summary judgment in favor of Petitioners, Respondents Hawaiian Homes Commission and Department of Hawaiian Home Lands (hereinafter "State Respondents"), and Respondents Larry Jefts et al., concluding that there was no violation of the HHCA. *Bush II*, 81 Haw. at 478, 918 P.2d at 1141.

On appeal, the Hawaii Supreme Court, in a unanimous opinion, reversed the trial court's dismissal of Respondents' claims. *Id.*, 81 Haw. at 478, 918 P.2d at 1141. At the outset, the court noted that "there is no authoritative case law in this jurisdiction interpreting HHCA 208(5)," *Id.*, 81 Haw. at 485, 918 P.2d at 1141, and that "the nature of an agreement between homestead lessees and third parties must be examined closely to determine whether it complies with [the] statutory restrictions [set forth in § 208(5)]." *Id.*, 81 Haw. at 486, 918 P.2d at 1142. After a careful examination of applicable Hawaiian real property law, the court found that the TPAs "address specific parcels of property and are arguably for fixed terms because they require fixed notification periods for revocation", and thus declared that the approved TPAs,

on their face, transfer "at least a portion of the lessees' extant interest in their homesteads" in violation of § 208(5). *Id.*, 81 Haw. at 487, 918 P.2d at 1143. Accordingly, the court ordered that the lower court's order granting summary judgment in favor of the Petitioners, State Respondents, and Respondents Jefts et al. be reversed, and that summary judgment be entered in favor of Respondents. *Id.*, 81 Haw. at 487, 918 P.2d at 1143. From this judgment, Petitioners now seek review in this Court. State Respondents and Respondents Larry Jefts et al. chose not to appeal the Supreme Court's decision.

REASONS FOR DENYING THE PETITION

The Hawaii Supreme Court properly interpreted the HHCA in defining Petitioners' responsibilities thereunder, and, in any event, its interpretation of this unique Congressional enactment, a federal-state compact incorporated as part of the Constitution of the State of Hawaii for the purpose of providing benefits to native Hawaiians, raises no legal questions of more than purely local significance and implicates no substantial issues of federal law. Considerations of federalism argue strongly *against* review of this state court decision affecting only a particular state-run benefit program. Accordingly, Petitioners fail to satisfy criteria traditionally applied by this Court in determining whether or not to grant a Writ of Certiorari.

I.

PETITIONERS DID NOT PRESERVE THEIR "TAKING" CLAIM IN THE COURT BELOW AND THUS CANNOT RAISE IT HERE

Petitioners' sole Question Presented for Review herein is their claim that the "Hawaii Supreme Court has effected a regulatory and/or judicial taking of private property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. . . . " Pet., at 2. Petitioners did not, however, raise this issue in their Answering Brief before the Hawaii Supreme Court,[4] but instead first advanced it in their Motion for Reconsideration filed *after* the Hawaii Supreme Court issued its opinion in this case.[5] "A question not previously raised in the course of an appeal will not ordinarily be considered on a petition for rehearing," *Associated Engineers & Contractors, Inc. v. State of Hawaii*, 58 Haw. 322, 322, 568 P.2d 512, 513 (1977) (citations omitted), and Petitioners' Motion for Reconsideration failed to suggest any reason why Petitioners should have been exempted from this generally applicable restriction. Petitioners compounded their error by seeking support for their new arguments in documents not previously made a

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[4] *See,* Lessee-Defendants-Appellees' Answering Brief and Certificate of Service filed November 24, 1995, attached as Exhibit B to Appendix "F" of the Petition.

[5] *See,* Motion for Reconsideration, Memorandum in Support of Motion for Reconsideration, Certificate of Good Faith, Affidavit of Ward F.N. Fujimoto, Exhibits "A"-"C", and Certificate of Service attached as Appendix "F" to the Petition (hereinafter "Petitioner's Motion for Reconsideration").

part of the record.[6] Petitioners cited no authority for this highly unusual procedure[7] and offered no excuse for their failure to present these documents in a more timely manner.[8] The Hawaii Supreme Court properly denied Petitioners' Motion for Reconsideration without addressing the newly raised issues contained therein.[9] "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it," *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), and Petitioners' failure to preserve their "takings" claim for review before the Hawaii Supreme Court is fatal to their efforts to seek review here. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

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[6] *See*, Exhibit C, attached to Appendix "F" of the Petition.

[7] *Cf.* Rule 40(b), Hawaii Rules of Appellate Procedure (prescribing the contents of a motion for reconsideration and making no provision for the submission with such a motion of new evidence not previously made a part of the record).

[8] Respondents were not asked to comment on Petitioner's procedural irregularities as Rule 40(c) of the Hawaii Rules of Appellate Procedure provides in part that "[n]o answer to a motion for reconsideration or reply to an answer will be received unless requested by the court."

[9] *See*, Motions for Reconsideration filed 7/8/96, attached as Appendix "B" to the Petition.

II.

THE HAWAII SUPREME COURT CORRECTLY INTERPRETED THE SCOPE OF PETITIONERS' DUTIES UNDER THE HAWAIIAN HOMES COMMISSION ACT

Petitioners ask this Court to hold the Hawai'i Supreme Court's interpretation of § 208(5) of the HHCA as amounting to a "judicial taking" of their leasehold interest without payment of just compensation. Pet., at 15-20. Although members of this Court have on occasion expressed support for a "judicial taking" theory resembling that which Petitioners now espouse,[10] "[t]he question of whether courts, as opposed to legislative bodies, can ever "take" property in violation of the Fifth Amendment is an interesting and by no means settled issue of law." *Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). In any event, Petitioners' belated efforts to cobble together a factual record to support a judicial takings claim from a melange of supposed "admissions" and documents never properly admitted into the record on appeal are insufficient to support such a claim under any reasonable standard.

Petitioners claim that they were entitled to rely upon a previous ruling on the legality of TPAs under § 208(5)

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[10] *See Hughes v. Washington*, 389 U.S. 290, 296-98 (1967) (Stewart, J, concurring); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J, joined by O'Connor, J, dissenting from denial of petition for writ of certiorari); *see also Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 451, 903 P.2d 1246, 1272 (1995), *cert. denied sub nom. Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 116 S.Ct. 1559 (1996).

issued by a state trial court, Pet., at 19 (citing *Adolpho v. Kealoha*, Civ. No. 243 (Second Circuit Court, State of Hawai'i, 1960) is wholly without foundation as such trial court opinions have no binding precedential effect under Hawai'i law,[11] and, in any event, the contentious history of TPAs under the HHCA, described in detail in *Bush II*, 81 Haw. at 483, nn.13 & 14, 918 P.2d at 1139, nn.13 & 14, contradicts any claim that Petitioners could reasonably rely on the legality of TPAs.

Petitioners' claim that the Hawaii Supreme Court's decision deprives them of *all* economic use of their leaseholds hinges solely on a blatant mischaracterization of Respondents' argument below "that it is not economically viable to operate a homestead farm competing against such large-scale operations [as those of Jefts, et al.]." Pet., at 17. In fact, however, Respondents' argument has been that they are unable to compete against such large-scale operations *when those non-Hawaiian farmers benefit unlawfully from the subsidized land and irrigation water properly available under the HHCA only to native Hawaiians.*[12]

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[11] *Bush II*, 81 Haw. at 483 n.14, 918 P.2d at 1139 n.14 (recognizing that the decision of a state circuit court on an issue of law, upon which Petitioners now seek to rely, did not bind the Hawaii Supreme Court); *see also King v. United Commercial Travelers of America*, 333 U.S. 153, 161 (1948) (unappealed decisions of state trial court are not controlling as "authoritative expositions of that State's 'law' ").

[12] As discussed in Respondents' Opening Brief before the Hawai'i Supreme Court, Respondents Larry Jefts' et al.'s farming operations on Petitioner's leaseholds benefit from water provided to those leaseholds at nominal cost by the federally subsidized Moloka'i Irrigation System. *See*, Chapter 168, H.R.S..

Respondents are quite willing to take their chances in competition with Respondent Jefts et al.'s operations on non-trust lands, as those operations do not benefit from subsidies under the HHCA intended only for native Hawaiians. Proof of Petitioners' claims of financial non-viability would require proof as well of the much broader conclusion that the HHCA's agricultural homestead program as a whole, together with all other State of Hawaii programs intended to foster small-scale agriculture such as the Hawai'i Department of Agriculture's Agricultural Park program, Chapter 166, H.R.S., are economically non-viable and are therefore futile.

This is not a case in which a court has radically departed from well-established law by adopting a pretextual interpretation of state real property law to deprive an owner of his or her property rights; instead, the Hawai'i Supreme Court has merely determined, *as a matter of first impression*, the scope of the rights and responsibilities of the beneficiaries of a statutory entitlement program by asking whether the TPAs Petitioners seek to execute are lawful under § 208(5) of the Hawaiian Homes Commission Act, which prohibits a lessee from "transfer[ring] to or otherwise hold[ing] for the benefit of, any other person . . . except a native Hawaiian . . . or to sublet the lessee's interest in the [trust land leased to them]." § 208(5), H.H.C.A.

Petitioners' extensive discussion (at Pet., 7-15), that *Bush II* is inconsistent with prior Hawai'i case law which distinguish between license and leasehold interests, is without foundation as the result here turns on the language of the particular TPAs in question and the statutory rights and responsibilities of a government fiduciary

and of the beneficiaries of the HHCA. The powers of the former entity and the rights of the latter group are necessarily limited by the restrictions imposed by that statute and the administrative rules properly adopted under its authority.[13]

Petitioners' arguments amount to no more than a claim that the Hawaii Supreme Court misinterpreted a provision of the HHCA, a claim not within the scope of Petitioners' "Question Presented for Review," Pet., at 2, and a matter fulfilling none of the criteria which guide this Court in selecting cases for review.[14] Petitioners admit as much by attempting to reargue, *as a matter of policy*, the merits of the Hawaii Supreme Court's interpretation of the HHCA.[15] Accordingly, the Petition for Writ of Certiorari must be denied.

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[13] The *Bush II* court found that when "compared with ordinary leaseholders, Hawaiian homestead lessees do not possess all of the 'sticks in the bundle of rights commonly characterized as property[.]' (citation omitted)". *Bush II*, 81 Haw. at 484, 918 P.2d at 1140.

The *Bush II* court's interpretation of § 208(5) of the HHCA and its application to the specific facts of this case is entirely consistent with other cases involving government restrictions on the use and disposition of federal Indian trust lands. *See, e.g., Ewert v. Bluejacket*, 259 U.S. 129 (1922) (restrictions placed on alienation of lands held by individual Indians are designed to protect the Indians as wards from improvident disposition of their lands, and to protect them from abuses of federal officials).

[14] *See* Rule 10, Rules of The Supreme Court of the United States (Considerations Governing Review on Certiorari).

[15] For example, Petitioner states at page 14 of the Petition that the "public policy precludes treatments of licenses as interests in land". Similarly, at page 18 Petitioner argues that the Hawaii Supreme Court's holding "cannot be consistent with

III.

PETITIONERS ALLEGATIONS OF A REGULATORY TAKING LACK ANY SUPPORT IN THE RECORD

Not satisfied with their wholly unsupported claim of a "judicial taking", Petitioners next attempt to mischaracterize the facts of this case as a "regulatory taking". Pet., at 21-23. As this Court, however, has correctly noted, a regulatory taking will only occur if the property owner is deprived of "all economically beneficial or productive use" of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Again, Petitioners have failed to point to any reference in the record below that shows that the *Bush II* opinion prohibits a lessee from entering into other arrangements for the occupation, cultivation and use of their agricultural homestead leases.[16]

IV.

PETITIONERS CANNOT SUPPORT THEIR CLAIMS OF INJURY TO "INVESTMENTBACKED" EXPECTATIONS

Petitioners misrepresent the facts of this case when they claim that they "accepted [the Department of Hawaiian Home Lands'] invitation to sign approved TPAs" and therefore "invested, through actions and/or forbearance, time and money into the relationships in reliance on the legal validation of the TPAs by [State Respondents]." Pet.,

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HHCA's goals of rehabilitation and 'betterment' of native Hawaiians through self-determination".

[16] For instance, *Bush II* does not prohibit Petitioners from farming the land themselves or under a "legitimate employment contract" with others, including native Hawaiians. *Id.*, 81 Haw. at 487, 918 P.2d at 1143; *see also* § 208(5), H.H.C.A.

at 25. In fact, as the court found in *Bush I*, Petitioners entered into these TPAs *without approval by State Respondents* and thus were in clear violation of the Commission's administrative rules. *Bush I*, 76 Haw. at 132, 870 P.2d at 1281. State Respondents' attempt to approve the TPAs was a mere attempt to give after-the-fact protection to preexisting transactions and was by no means an "invitation" inducing Petitioners to take action [i.e., initiate TPAs] they would not otherwise have undertaken. Indeed, the absence of any reliance by Petitioners on the supposed "legal validation of the TPAs by the DHHL/HHC" is clearly demonstrated by the fact that the TPAs contained language expressly agreeing to indemnify the State Respondents from any expenses resulting from their approval of the TPAs.[17] In any event, those who, like Petitioners, transact business with a trustee are bound by the limits of the trustee's authority to bind the trust, and any transaction violative of the terms of the trust is void *ab initio* and does not create liability on behalf of the trust in favor of Petitioners.[18]

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[17] As the *Bush II* court correctly found, the TPAs expressly provided that Petitioner and Respondent Larry Jefts et al. would indemnify the Department against "all losses, damages, costs, expenses . . . on account of any demand, claim or suit for any loss of damage to property, property right or injury or death to any person arising out of, caused by or in any way connected with the implementation, use, or reliance upon this Third Party Agreement". *Bush II*, 81 Haw. at 482, 918 P.2d at 1138.

[18] *See, e.g., United States v. Algoma Lumber Co.*, 305 U.S. 415, 422 (1939) (United States not liable to third party when it contracts on behalf of Indian tribes); *Sangre de Cristo Development Co. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992).

V.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

RULE 40, HAWAII RULES OF APPELLATE PROCEDURE (HRAP)

Rule 40, Motion for Reconsideration

(a) **Time.** A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

(b) **Contents.** The motion shall state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. The motion shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for purposes of delay.

(c) **Answer; Reply; Argument.** No answer to a motion for reconsideration or reply to an answer will be received unless requested by the court. There shall be no oral argument on a motion for reconsideration unless ordered by the court on its own motion.

(d) **Disposition of Motion.** The court within 10 days of the filing of a motion for reconsideration, shall either grant or deny such motion. The failure of the court to act within the 10 days shall constitute a rejection. If a motion for reconsideration is granted, the court may modify the decision without new argument, order new argument, or take such action as may be appropriate.

(e) **Only One Motion Permitted.** Only one motion for reconsideration may be filed by any one party, even if the court modifies its decision or changes the language in the opinion rendered by the court.